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In The

Supreme Court of the United States

October Term, 1976

No. 76-1805

AARON BRAVMAN,

Petitioner,

v.

BASSETT FURNITURE INDUSTRIES, INC. and BASSETT MIRROR CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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II. This Court should resolve the conflict among the circuits and decide the important federal question of whether "dangerous probability of success" of achieving monopoly is an essential element of an "attempt to monopolize" under Section 2 of the Sherman Act. 7

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, reported at 552 F.2d 90 (3rd Cir. 1977), is contained in the Appendix to respondents' Petition for a Writ of Certiorari, October Term, 1976, No. 76-1597, incorporated by reference and

not reproduced separately herein. The District Court delivered no opinion in granting defendants' motions for directed verdicts.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1977. Petitioner's timely petition for rehearing was denied by the Court of Appeals on March 23, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether two dominant furniture manufacturers who conspire, for the purpose of harming competition, to coerce their independent sales representative not to sell competing products, despite the inability of those manufacturers to provide a sufficient supply of merchandise to fill their representative's orders, have conspired to monopolize in violation of Section 2 of the Sherman Act.

(2) Whether a manufacturer which has undertaken a substantial course of damaging conduct designed to harm competition, by preventing or impeding the sale of competing products, without legitimate business purpose, has violated the proscription of Section 2 of the Sherman Act against attempts to monopolize.

STATUTORY PROVISIONS INVOLVED

In addition to Sections 1 and 4 of the Sherman Act, 15 U.S.C. §§1, 15 (Petition in No. 76-1597, p. 3), this case involves Section 2 of the Sherman Act, 15 U.S.C. §2, which provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

STATEMENT OF THE CASE

Petitioner Aaron Bravman, plaintiff below, relies upon the facts as stated in the majority opinion of the Court of Appeals (see Petition in No. 76-1597, pp. 2a-6a, 9a-12a, 13a-15a, 26a-28a, 29a-30a, 31a-33a), and as summarized in the Brief for Respondent in Opposition in No. 76-1597 (pp. 3-4), incorporated by reference.

The Court of Appeals described the implications of defendants' restrictive practices as follows (Petition, pp. 26a-27a):

> "Between May of 1970 and September of 1972 [when Bravman's representation was terminated in retaliation for his non-observance of the restraints] the restraints continued. During this period, however, Bravman was also subjected to the total withdrawal of Bassett Furniture's table products and Bassett Mirror's products, plus a drastic reduction in case goods. The attempt by Bassett Furniture to impose its exclusive representation policy upon Bravman in a period where such a restraint was seemingly

unreasonable on its face lends more weight to Bravman's claim of §4 standing. Such an attempt suggests not only that Bassett Furniture had substantial market power, but also exercised that power in a manner which may place unreasonable restraints on the distribution channels within the furniture industry."

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals, which holds that a conspiracy to exclude competing products from the marketplace, and having no legitimate business purpose, does not violate Section 2 of the Sherman Act, is clearly contrary to the decisions of this Court.

The majority in the Court of Appeals recognized that the restraints which defendants conspired to impose upon Bravman "were obviously aimed at enhancing the competitive position of the Bassett Companies vis-a-vis other furniture manufacturers . . . [and] were also aimed at enhancing the competitive position of Bassett's sales representatives" (Petition, p. 27a). The majority also found that the facts supported the conclusion that "Bassett Furniture, a comparative giant in the furniture manufacturing business, acting in concert with Bassett Mirror, imposed upon Bravman a restraint having no significant relationship to any legitimate business interest, but only an anti-competitive result" (Petition, p. 33a).

Thus, the Court of Appeals held, despite facts showing that defendants conspired to enhance their competitive position, without any legitimate business purpose, by keeping competing merchandise flowing in interstate commerce out of Bravman's territory in eastern Pennsylvania (see map of territory in Appellant's Appendix in the Court of Appeals, p. 566a), that there was no conspiracy "to monopolize any part of the trade or commerce among the several States," and therefore there could be no violation of Section 2 of the Sherman Act.

Bravman respectfully submits that the holding of the Court of Appeals is flatly in conflict with controlling decisions of this Court.

Monopoly is "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Here defendants, who were unable or unwilling to provide Bravman with sufficient furniture merchandise to sell, nevertheless, for no legitimate business reason, forced him not to sell competing merchandise. The conclusion is inescapable and unrebutted that defendants intended by their conspiracy to suppress the sale of competing merchandise. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-27 (1939). "The Sherman Act forbids combinations of traders to suppress competition." *United States v. Parke, Davis & Co.*, 326 U.S. 29, 45 (1960).

> "When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to

> accomplish such an unreasonable restraint may render the actor liable under the Sherman Act."

United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948).

> "[W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct."

United States v. General Motors Corp., 384 U.S. 127, 146 (1966).

Despite the recognition by the Court of Appeals that the evidence supported a finding that defendants acted pursuant to a conspiracy reflecting a shared purpose to exclude competing goods from the marketplace,[1] it held (Petition, p. 34a):

> "There is, however, no evidence suggesting a sufficient nexus between the possibly illegal restraint on Bravman's services and the exclusion of other furniture manufacturers from his territory to support a jury finding of specific intent to monopolize furniture sales in that territory."

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1. Significantly, Bassett Mirror, itself larger than 87% of the furniture manufacturers in the country, could not support its own sales organization and therefore utilized the sales organization of Bassett Furniture (Appellant's Appendix in the Court of Appeals, pp. 261a-62a, 438a-39a).

The holding of the Court of Appeals, then, is that a conspiracy to exclude competition does not violate Section 2 of the Sherman Act unless it is successful, and can be proven to have achieved its unlawful objective. On the contrary, this Court has held that an unlawful agreement to exclude competitors *itself* violates Section 2. *American Tobacco Co. v. United States,* 328 U.S. 781, 789 (1946) ("Petitioners . . . might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy, *i.e.,* to exclude actual and potential competitors from the cigarette field."). *See also United States v. Griffith,* 334 U.S. 100, 107 n.9 (1948); *United States v. Yellow Cab Co.,* 332 U.S. 218, 225-27 (1947); *United States v. Consolidated Laundries Corp.,* 291 F.2d 563, 573 (2d Cir. 1961); von Kalinowski, *Antitrust Laws and Trade Regulation,* §§9.02[1][a], 9.01[4], 9.02[5] (1976).

II.

This Court should resolve the conflict among the circuits and decide the important federal question of whether "dangerous probability of success" of achieving monopoly is an essential element of an "attempt to monopolize" under Section 2 of the Sherman Act.

Despite the long passage of time since the enactment of the Sherman Act in 1890, this Court has not yet settled the important question of whether a "dangerous probability of success" of achieving monopoly is an essential element of an "attempt to monopolize" under Section 2 of the Sherman Act.

In *Swift & Co. v. United States,* 196 U.S. 375, 396 (1905), the Court made the following statement:

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, — for instance, the monopoly, — but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee,* 177 Mass. 267, 272, 59 N.E. 55. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

In *American Tobacco Co. v. United States,* 328 U.S. 781, 785 (1946), this Court affirmed a criminal conviction under Section 2 of the Sherman Act where the trial court charged the jury as follows:

> "The phrase attempt to monopolize means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment."

The fact that the issue has not been settled, however, is evidenced by the conflict which exists among the circuits. The Ninth Circuit, in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75, *cert. denied*, 377 U.S. 993 (1964), rejected "the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize" (footnote omitted). *Lessig's* holding has been reaffirmed by the Ninth Circuit. See *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 12 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, *reh. denied*, 419 U.S. 1028 (1974); *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1205 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

Other circuits have held that a "dangerous probability of success" of achieving monopoly power is an essential element of proof of an "attempt to monopolize" under Section 2 of the Sherman Act. *E.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 339 (4th Cir. 1959); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 (5th Cir. 1969); *United States v. Empire Gas Corp.*, 537 F.2d 296, 302-03 (8th Cir. 1976), *cert. denied*, 97 S. Ct. 1158 (1977); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). See generally, ABA *Antitrust Law Developments*, pp. 60-63 (1975).

Plaintiff submits that this Court should decide the issue and reject the notion that proof of an attempt to monopolize requires a showing of dangerous probability of success of achieving monopoly power where (as here) a defendant has

engaged in substantial, damaging conduct with no purpose other than the exclusion of competitors from the marketplace. So long as a defendant has been shown to have acted with an unlawful purpose to the exclusion of a legitimate business purpose, coupled with substantial, harmful conduct in furtherance of the unlawful purpose, there is no reason not to require the defendant to recompense persons injured in their business or property thereby.

Plaintiff's suggested view comports with the approach to attempts taken by contemporary criminal law doctrine. See ALI *Model Penal Code* §5.01 (Proposed Official Draft 1962); Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum. L. Rev. 571, 573 (1961) ("the crime [of attempt] becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose . . .").[2]

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2. In *United States Steel Corp. v. Fortner Enterprises, Inc.*, 45 U.S.L.W. 4171, 4172 n.1 (February 22, 1977), this Court stated that "'increasing sales' and 'increasing market share' are normal business goals, not forbidden by §2 without other evidence of an intent to monopolize. . . . No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales." The present case presents facts where large firms, with relatively small market shares because of the existence of many smaller companies, engaged in predatory conduct designed to reduce sales by competitors. *See Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 12-13 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, *reh. denied*, 419 U.S. 1028 (1974) ("evidence of market power may be relevant, but it is not indispendable where a substantial claim of restraint of trade is made").

CONCLUSION

For the foregoing reasons the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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s/ Roger F. Cox

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, filed by Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc., No. 76-1597) is reported at 552 F.2d 90 (3d Cir. 1977). The District Court did not file an opinion.

QUESTIONS PRESENTED

1. Whether a party which abandoned an issue in the proceedings below should be allowed to raise it again in a petition for writ of certiorari;

2. Whether this Court should review the decision of the Court of Appeals affirming the decision of the District Court that there was not sufficient evidence to support a claim of attempted monopolization where there was no evidence defining the markets, no dangerous probability of success, and no evidence of specific intent to monopolize, on the particular facts of this case.

STATEMENT OF THE CASE

Respondents Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc. rely upon the facts as stated in the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in No. 76-1597 (pp. 4-7), incorporated by reference, and the facts found by the Court of Appeals at *Id* (pp. 33a-34a).[1] The Court of Appeals there stated:

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1. Citations to the opinion of the Court of Appeals below refer to the copy of that opinion printed as the appendix to the petition for certiorari filed by Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc. in No. 76-1597.

"A Section 2 charge of attempt to monopolize requires a finding of 'specific intent' to do so.[40] Such an intent may be inferred from circumstantial evidence.[41] Circumstantial evidence from which such intent may be inferred includes engaging in unlawful conduct,[42] and specific intent to combine or conspire in such conduct.[43]

In his brief on appeal Bravman limits his Section 2 charge to the claim that defendants attempted to monopolize the sale of residential furniture within the territory assigned to him. An attempt to monopolize directed at a specific geographic area falls within §2.[44] We have held above that the jury could have found a conspiracy in violation of Section 1. There is, however, no evidence suggesting a sufficient nexus between the possibly illegal restraint on Bravman's services and the exclusion of other furniture manufacturers from his territory to support a jury finding a specific intent to monopolize furniture sales in that territory."

40. *E.g. United States v. Columbia Steel Co.*, 334 U.S. 495, 532 (1948); *United States v. Griffith*, 334 U.S. 100, 105-07.

41. *See, e.g., Interstate Circuit Inc. v. United States*, 306 U.S. 208, 224-27 (1939); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600 (1914).

42. *See, e.g. United States v. Griffith, supra,* 334 U.S. at 105-09; *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947); *United States v. Crescent Amusement Co.,* 323 U.S. 173 (1944).

43. *United States v. Singer Mfg. Co.,* 374 U.S. 174 (1963); *American Tobacco Co. v. United States,* 328 U.S. 781 (1946).

44. *See, e.g., United States v. Yellow Cab Co.,* 332 U.S. 218, 225 (1947).

ARGUMENT

I.

Petitioner's claim that Bassett Furniture Industries, Inc. and Bassett Mirror Company, Inc. conspired to monopolize some undefined market was abandoned in the proceedings below, and should not be considered at this time.

As the majority of the Court of Appeals expressly found, Bravman limited his Section 2 appeal to the claim that respondents attempted to monopolize the sale of residential furniture within the territory assigned to him (34a).

Now, before this Court, Bravman seeks to raise the question of conspiracy to monopolize which was not pressed before the Third Circuit. As this Court has consistently recognized, it is improper to use certiorari as a means of obtaining initial determination of a question abandoned or not raised below. *See, e.g., California v. Taylor,* 353 U.S. 553, 557 n.2 (1957). The

court below made no holding with respect to conspiracy to monopolize, nor was it required to. There is no decision on that point for this Court to review. Bravman should not be allowed to inject this new issue at this stage of the proceedings.

On the merits, such a conspiracy to monopolize claim is almost frivolous. Without establishing what the market was, Bravman conceded that Bassett Furniture had only a 3% share of it. And the conduct which the Court of Appeals considered possibly illegal in the context of a §1 charge, limiting Bravman's territory and requiring him to work for the respondents exclusively (29a), can in no way be termed "predatory." On its facts, this case falls squarely under the recent decision of this Court in *U.S. Steel Corp. v. Fortner Enterprises, Inc.*, 1977-1 Trade Cases ¶61,294 (U.S. S.Ct. Feb. 22, 1977). As this Court there stated:

> "But 'increasing sales' and 'increasing market share' are normal business goals, not forbidden by §2 without other evidence of an intent to monopolize. The evidence in this case does not bridge the gap between the District Court's findings of intent to increase sales and its legal conclusion of conspiracy to monopolize. Moreover, petitioners did not have a large market share or dominant market position. See n.3 *infra*. No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales. " *Id.* at p. 70, 936 n. 1.

That principle covers the present case, and nothing would be served by repeating the rule on the facts of this case.

II.

The decision of the court below that petitioner failed to present any evidence sufficient to support a claim of attempted monopolization was proper, in accord with settled law, and presents no issue justifying review by this Court.

On appeal to the Third Circuit, Bravman alleged that Bassett Furniture and Bassett Mirror attempted to monopolize some market. The phrase "attempt to monopolize" has been repeatedly defined by this Court to mean the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. *See, e.g., American Tobacco Company v. United States,* 328 U.S. 781, 785 (1946). Under the settled law as set forth by this Court, to make out a charge of attempted monopolization, Bravman had to present evidence establishing the applicable geographic and product markets; *Walker, Inc. v. Food Machinery Corp.,* 382 U.S. 172, 177 (1965).

Bravman presented no evidence as to what the relevant market was, which by itself fully justified the opinion of the Court below that he had not made out an attempt to monopolize case. And even on his own, hypothetical market, Bravman conceded that Bassett had only a 3% share of it.[2] It is

2. Bravman's petition ignores the fact that he conceded that Bassett Furniture had only 3% of the market that he thought was relevant (appellant's appendix in the Court of Appeals p. 459a). Research has not disclosed any case in which a company with such a minuscule market share was found to be capable of attempted monopolization.

untenable to assert, as petitioner does, that a company in a highly competitive business, with 3% of the market (undefined), has created a dangerous probability of monopolizing that market. And there was no evidence that respondents had any power to control price or exclude other manufacturers from any market.

In addition, the cases are uniform in requiring that a specific intent to monopolize be proven.

> "[W]hen that intent [to monopolize] and the consequent dangerous probability exist, this statute [the Sherman Act] like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Lorain Journal Co. v. United States,* 342 U.S. 143, 153 (1951).

> . . . a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt [to monopolize] now charged." *Times-Picayune v. United States,* 345 U.S. 594, 626 (1953).

Accord, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 224-227 (1939). There was no evidence of such specific intent here. Respondents naturally wanted to increase sales and market share, to compete with other manufacturers, but as this Court recently reaffirmed these are normal business goals, not forbidden by §2; *United States Steel Corp. v. Fortner Enterprises, Inc.*, 1977-1 Trade Cases ¶61,294, p. 70,936 n. 1

(U.S. S. Ct. Feb. 22, 1977). To hold otherwise would be to say that the Sherman Act forbids competition.

Besides failing to show the relevant market, the record is totally devoid of any evidence that the restraint on Bravman's services excluded any other furniture manufacturer from any geographic territory.[3] There was no nexus shown between the alleged restraint and any injury to competition.

In light of Bravman's total failure to produce evidence as to what was the relevant geographic or product market, his concession that even based upon his own concept of what the relevant markets might be that Bassett Furniture had only 3% of that market share, and the total lack of evidence of specific intent to monopolize, the Court of Appeals' affirmance of the District Court's holding that there was insufficient evidence for a jury to find an illegal attempt to monopolize was clearly correct, and presents no issues worthy of this Court's review.

III.

The internal dispute within the Ninth Circuit Court of Appeals should not be reviewed by this Court in the context of a decision by the Court of Appeals for the Third Circuit which totally conforms with the ruling decisions of this Court.

Bravman recognizes that as far back as *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905), and continuing in an unbroken line of decisions, this Court has held that a dangerous

3. No testimony of other furniture manufacturers was offered or presented, and Bravman in fact presented no evidence that such furniture manufacturers would have constituted the appropriate product market.

probability of success must be shown in order to make out a charge of attempt to monopolize, *See, e.g., American Tobacco Company v. United States,* 328 U.S. 781, 785 (1946) (quoted by Bravman at Petition p. 8). Bravman then suggests that because the Ninth Circuit Court of Appeals has maintained a running internal dispute as to whether to follow these decisions of this Court, that the instant decision by the Third Circuit which is totally in accord with the rules set forth should be reviewed now. There is no justification for such an approach.

The rule laid down by this Court is clear, and was followed by the court below. It is true that the Ninth Circuit has refused to follow this rule on occasion.[4] But although the question of whether the Ninth Circuit will continue to ignore the decisions of this Court on this point is one which may have intellectual interest, it in no way requires or even suggests that this Court review the present case, decided by the Third Circuit Court of Appeals, which totally follows the applicable decisions of this Court.

Apparently recognizing the weakness of his position on this point, petitioner then suggests that the entire line of cases requiring dangerous probability of success, be scrapped for his benefit. Aside from the dubious merits of petitioner's legal theory, this case is quite an inappropriate vehicle for reconsidering that settled rule of antitrust law. Bravman failed to

4. *See Lessig v. Tidewater Oil Company,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964). *But see Cornwell Quality Tools Company v. C.T.S. Company,* 446 F.2d 825 (9th Cir. 1971), *cert. denied,* 404,1049 (1972) (distinguishing and apparently overruling *Lessig*); and *Hallmark Industry v. Reynolds Metals Co.,* 489 F.2d 8 (9th Cir. 1973), *cert. denied,* 417 U.S. 932 (1974) (distinguishing *Cornwell* and reaffirming *Lessig*).

establish the markets, failed to show specific intent, and failed to show any effect on competition, or competitors of the respondents. As the Court of Appeals found, there was no evidence connecting the alleged restraints on Bravman and the exclusion of other manufacturers (33a-34a).

Given petitioner's failings, and the barren state of the record below, a decision of this Court on the dangerous probability issue would be little more than an advisory opinion. No matter what the result, petitioner still will have failed to establish his claim. This Court should not decide such a question of law as petitioner proposes where, as here, it will have no effect on the case.

CONCLUSION

For the foregoing reasons, this Court should deny Bravman's petition for a writ of certiorari.

Respectfully submitted,

s/ J. Shane Creamer
Attorney for Respondent Bassett Furniture Industries, Inc.

s/ Ralph W. Brenner
Attorney for Respondent Bassett Mirror Company, Inc.

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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1805

AARON BRAVMAN,

Petitioner,

vs.

BASSETT FURNITURE INDUSTRIES, INC. and BASSETT MIRROR COMPANY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Plaintiff did not abandon his claim that defendants conspired to monopolize the sale of residential furniture within the territory assigned to him.

Defendants assert to this Court that plaintiff, petitioner

herein, abandoned his contention that defendants conspired to monopolize in violation of Section 2 of the Sherman Act (Brief for Respondents in Opposition to Petitioner's Cross Petition for a Writ of Certiorari, p. 4).

That defendants are incorrect in this statement is evident from an examination of pertinent sections of plaintiff's briefs in the Court of Appeals:

> "Plaintiff does not contend that defendants, or either of them, monopolized the residential furniture industry. It is submitted, however, that the evidence justified a finding that defendants attempted or conspired to monopolize the sale of residential furniture, within the territory assigned to appellant" (Brief for Appellant, p. 38).
>
> * * *
>
> "Because defendants acted pursuant to a conspiracy reflecting a shared purpose to exclude competitors from access to the marketplace, they violated Sections 1 and 2 of the Sherman Act" (Brief for Appellant, p. 43).
>
> * * *
>
> "According to defendants, 'A plaintiff who would establish a charge of attempted monopolization must [in addition to an intent to monopolize] also show that there was a

dangerous probability that the defendant would have succeeded in monopolizing the market in a reasonable period of time' (Brief for Appellees, p. 20). (Defendants appear to acknowledge that no such 'dangerous probability' need be shown to prove conspiracy to monopolize (Brief for Appellees, pp. 21-22). See *American Tobacco Co. v. United States,* 328 U.S. 781, 789 (1946).)" (Reply Brief for Appellant, pp. 7-8).

* * *

"6. The majority concluded, erroneously it is respectfully submitted, that on appeal Bravman 'limits his Section 2 charge to the claim that defendants attempted to monopolize the sale of residential furniture within the territory assigned to him.'" (Slip opinion, p. 25).

"7. Bravman in fact also contended that defendants *conspired* to monopolize the sale of residential furniture. (Brief for Appellant, pp. 38, 42-43; Reply Brief for Appellant, pp. 7-8)." (Petition of Appellant for Rehearing, pp. 2-3).

Moreover, plaintiff in his original brief in the Court of Appeals quoted the same statements from *United States v. Parke, Davis & Co.,* 362 U.S. 29, 45 (1960), and *United States v. Columbia Steel Co.,* 334 U.S. 495, 525 (1948), which appear at pages 5 and 6 of his petition herein (Brief for Appellant, p. 42).

Defendants themselves acknowledged in the Court of Appeals that "[p]laintiff has claimed that defendants conspired to monopolize the relevant market," and devoted a full page of their brief to this contention (Brief for Appellees, pp. 21-22). Plaintiff's contention that defendants conspired to monopolize was never abandoned or waived in the Court of Appeals.

CONCLUSION

For the foregoing reasons the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

s/ Edwin P. Rome
s/ Roger F. Cox

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